United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF AND APPENDIX

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74-1284

P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1284
Cal. No.

ANTHONY de CARVALHO,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR THE PETITIONER

Brief & Appendix

MORTON B. DICKER
Attorney for Petitioner
Office & P.O. Address
The Legal Aid Society
11 Park Place
New York, New York 10007
TEL: BA 7 - 2755

JULIUS C. BIERVLIET and
JANET M. CALVO, of counsel

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BRIEF FOR THE PETITIONER

PRELIMINARY STATEMENT

This is an Appeal from a Decision of the Board of Immigration Appeals. The Board dismissed petitioner's appeal of the decision of Immigration Judge Howard I. Cohen denying petitioner's motion to reopen deportation proceedings and ordering petitioner deportable. Jurisdiction of this appeal is founded in the Immigration and Nationality Act §106 (a) (8 U.S.C. §1105(a)) which provides for judicial review of

orders of deportation and lays venue in the judicial circuit of petitioner's residence or where the administrative proceedings before the Immigration Judge were conducted.

QUESTION PRESENTED

Under the Immigration and Nationality Act, a permanent resident who has been convicted of a marijuana related offense is excludable or deportable from the United States. However, a permanent resident of more than seven years who has been convicted of such an offense and who has left the United States after his conviction may request discretionary relief to continue domicile in the United States in an exclusion proceeding. Such a person who has left and returned to the United States after his conviction without initiation of an exclusion proceeding may also request such discretionary relief in a deportation proceeding. But a permanent resident of more than seven years who has been convicted of a marijuana related offense and who has remained in the United States after his conviction is barred from seeking discretionary relief. Does the Immigration and Nationality Act Section 212(c) (8 U.S.C. §1182(c)) violate petitioner's Fifth Amendment equal protection right because it denies him an opportunity to request discretionary relief to continue domicile in the United States only because he remained in the United States after his conviction?

FACTS

Petitioner is a native and citizen of Portugal. He is twenty-seven years of age.

On December 10, 1956, at the age of nine, petitioner entered the United States with his family as a permanent resident alien and has resided with his family in the United States since that date. Petitioner's present residence is Yonkers, New York. All of petitioner's immediate relatives live in the United States. His mother, Maria de Carvalho, is a United States citizen. His father, Joaquim de Carvalho, and his brother, Raymond de Carvalho, are permanent residents.

On November 27, 1967, petitioner was convicted of avoiding payment of tax on the transport of illicit drugs and sentenced to a maximum term of six years imprisonment. On March 1, 1968, petitioner was ordered deported by the United States Immigration Service in Oklahoma, as a consequence of his criminal conviction. However, he was granted an indefinite stay. Petitioner was again ordered deported from the United States on January 15, 1974. Immediately upon notice of his imminent deportation, he solicited the aid of The Legal Aid Society. Your petitioner's attorney moved that the deportation order be

reopened in order to seek relief pursuant to Section 212(c) of the Immigration and Nationality Act, (8 U.S.C. 1182(c)), but the motion was summarily dismissed administratively and your petitioner was told to surrender. Petitioner surrendered on January 29, 1974, but was subsequently released on February 5, 1974.

In New York, New York, on February 5, 1974, Immigration Judge Howard I. Cohen denied petitioner's motion to reopen the proceeding to request relief under Section 212(c) stating:

> No authority exists for me to rule on the constitutionality of any motion. Hence I am compelled to deny the motion in all respects.
>
> (Decision page 2)

In a decision dated February 21, 1974, the Board of Immigration Appeals dismissed petitioner's appeal of the Immigration Judge's decision stating:

> Our function, however, does not include passing upon the constitutionality of the statutes we administer.
>
> (Decision page 3)

On April 9, 1974, petitioner's Petition for Review of Deportation Order was filed in this Court.

STATUTORY PROVISIONS

The Immigration and Nationality Act, Section 241(a)(11), (8 U.S.C. 1251(a)(11)), provides in relevant part:

> Any alien in the United States...shall, upon the order of the Attorney General, be deported who - ...at any time has been convicted of a violation of...any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana.

The Immigration and Nationality Act, Section 212(a)(23), (8 U.S.C. 1182(a)(23)), provides in relevant part:

> [T]he following class of aliens...shall be excluded from admission into the United States: Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana...

Section 212(c) of the Immigration and Nationality Act, (8 U.S.C. 1182(c)), states:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard

to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a).

ARGUMENT

POINT I

STATUTORY ELIGIBILITY TO APPLY FOR DISCRETIONARY RELIEF IS A JUDICIALLY PROTECTABLE RIGHT.

The right involved in this case is the legal capacity to request discretionary relief to continue domicile in the United States. Statutory eligibility to apply for discretionary relief has been recognized as a judicially protectable right. Eligibility for discretionary relief does not compel the granting of the relief requested, but it does give the alien the right to have his case considered i.e., he has a right to demand that the Attorney General exercise his discretion. U.S. ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954); Asimakopoulos v. I.N.S., 445 F. 2d 1362 (9th Cir., 1971); U.S. ex rel Partheniades v. Shaughnessy, 146 F. Supp. 772 (S.D.N.Y., 1956). Furthermore, the courts will review a determination to ascertain whether the "Attorne General" exercised "his" discretion in a non-capricious and non-arbitrary manner and whether "his" decision was supported by "reasonable, substantial and probative evidence on the record considered as a whole." Foti v. I.N.S., 375 U.S. 217 at 228 (1963); Wong Wing Hang v. I.N.S., 360 F. 2d 715

at 718 (2nd Cir., 1966); U.S. ex rel Partheniades v. Shaughnessy, 146 F. Supp. 772 at 774-775 (S.D.N.Y., 1956).

POINT II

THE IMMIGRATION AND NATIONALITY ACT §212(c) DENIES PETITIONER EQUAL PROTECTION OF LAW.

The Immigration and Nationality Act provides that an alien who has been convicted of a violation of any law or regulation relating to the illicit possession or traffic in marijuana or a narcotic drug shall be deported from the United States, §241(a)(11), (8 U.S.C. 1251(a)(11)). Similiarly, an alien who has been convicted of such an offense shall be excluded from admission into the United States. I&NA §212(a)(23), (8 U.S.C.§1182(a)(23)).

However section 212(c) of the law provides that a permanent resident alien returning to an unrelinquished domicile in the United States of more than seven years may be admitted in the discretion of the Attorney General regardless of his conviction. (8 U.S.C. §1182(c)).

A permanent resident alien may apply for discretiona relief under §212(c) in both an exclusion and a deportation proceeding. (8 C.F.R. §212.3) However, to be eligible for such relief in a deportation proceeding, the permanent resident must have left the United States and re-entered after his conviction. In 1956, deportation proceedings were brought against a permanent resident because he had

been convicted in 1947 for violating 26 U.S.C. 3234(a) (1946 ed) in that he imported marijuana into the United States without having registered or paid the special tax. Matter of G_____A_____, 7 I&N, Dec. 274 (BIA, 1956).[1] Sometime after his conviction he had departed from the United States but he returned in 1952. The Board of Immigration Appeals allowed the permanent resident to apply for discretionary relief under §212(c) and granted the relief nunc pro tunc, holding that he was lawfully admitted to the United States in 1952 pursuant to the Attorney General's discretion. See also Matter of S_____, 6 I&N, Dec. 392 (BIA, 1954, approved A.G., 1955). Compare the decision in Arias-Uribe in which the permanent resident remained in the United States after his conviction. Matter of Arias-Uribe, 13 I&N, Dec. 696 (BIA, 1971). Deportation proceedings were brought against Mr. Arias-Uribe, a permanent resident for more than seven years, because he had been convicted for possession of heroin. The Board of Immigration Appeals held that Mr. Arias-Uribe was not eligible for discretionary

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[1] Administrative Decisions Under Immigration And Nationality Laws Of The United States.

relief under §212(c) because he did not leave the United States and return after his conviction.

Your petitioner has been a permanent resident and has resided in the United States for the past eighteen years. He was convicted of a marijuana related offense. The Board of Immigration Appeals held that he was not eligible for discretionary relief under §212(c). If your petitioner had voluntarily departed from the United States after his conviction and was now seeking re-entry into this country, he would be eligible for discretionary relief in an exclusion proceeding. If your petitioner had voluntarily departed from, and then re-entered the United States after his conviction, he would be eligible for discretionary relief in a deportation proceeding. Your petitioner is not eligible for discretionary relief only because he remained in the United States. Petitioner therefore contends that §212(c) denies him equal protection of law.

A. Federal Equal Protection

The Supreme Court and lower federal courts have applied the concept of equal protection of the laws to federal legislation through the due process clause of the Fifth Amendment. A companion case to Brown v. The Board of

Education, Bolling v. Sharpe, held that racial segregation in the District of Columbia public schools violated the due process clause of the Fifth Amendment. The Court stated:

> The Fifth Amendment...does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the law' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.
>
> 347 U.S. 497 at 499 (1954).

The Supreme Court did not limit "federal equal protection" to situations of racial discrimination such as that in Bolling v. Sharpe. The Court in Schneider v. Rusk found that Fifth Amendment due process was violated by a federal statute which revoked the citizenship of a naturalized United States citizen "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated" unless he met certain statutory exceptions. The Court found that the statute

was based on the assumption that naturalized citizens were less reliable and bore less allegiance to the United States than native-born citizens, since native-born citizens could live abroad indefinitely without threat of losing their citizenship. In the court's view, naturalized citizens were denied 'federal equal protection':

> [W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'
>
> 377 U.S. 163, 168 (1964).

Present Supreme Court decisions have firmly established equal protection as a component of the Fifth Amendment Due Process Clause. For example, in Richardson v. Belcher, the Supreme Court stated:

> While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification which meets the test articulated in Dandridge (a case based on the Fourteenth Amendment Equal Protection Clause) is perforce consistent with the due process requirement of the Fifth Amendment.
>
> 404 U.S. 78, 81 (1971).

In U.S. Department of Agriculture v. Moreno, the Supreme Court applied "traditional equal protection analysis" and struck down section 3e of the Federal Food Stamp Program Act holding that the section created " an irrational

classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment."[2] _____US_____37 LEd 2d 782 (1973).

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[2] For further discussion of 'federal equal protection' including circuit and district court cases see Bernard Harvith, "Federal Equal Protection And Welfare Assistance," 31 Albany Law Review, 210, 218-222, (1967); Bernard Harvith, "Federal Equal Protection And Educational Financing," 33 Albany Law Review, 1, 6-7, (1968).

B. Equal Protection Standards

Three equal protection standards have been developed by case law: the compelling state interest standard; the rational relationship standard, and a more demanding version of the rational relationship standard.[3] Petitioner asserts that section 212(c) violates equal protection under any standard.

(1) Compelling State Interest Standard

Under the compelling state interest standard, when a "suspect" classification such as race, or a "fundamental interest," such as interstate travel is involved, a Court will look at the statute in question with "strict scrutiny," and require that the government present a "compelling state interest" to justify the unequal treatment the statute mandates. See e.g. Loving v. Virginia, 388 U.S. 1 (1967); Shapiro v. Thompson, 394 U.S. 618 (1969).

The Supreme Court has made several statements which demonstrate it recognizes that deportation deprives a long

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[3] For discussions of Equal Protection Standards, see "Developments In The Law - Equal Protection," 82 Harvard Law Review, 1065 (1969); Gunther Gerald, "The Supreme Court, 197 Term - Forward: In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection," 86 Harvard Law Review 1 (1972).

term resident of all his "fundamental" and "Constitutional rights." Deportation of a long term permanent resident removes him from his family, home and possessions and deprives him "of all that makes life worth living." NgFung Ho v. White, 259 U.S. 276 at 284 (1922). "[D]eportation is a drastic measure and at times the equivalent of banishment or exile." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). See also Jordan v. DeGeorge, 341 U.S. reh. denied 223, 245 (1951); Galvan v. Press, 347 U.S. 522, 530 (1954).

Petitioner came to the United States with his family when he was nine years old. He grew up and was educated in this country. His immediate family has lived in the United States for eighteen years. His mother is a citizen and his brother and father are permanent residents. Deportation would subject him to loss of family and home and throw him into an alien country and culture.

Petitioner's situation is analogous to the circumstances of Shapiro v. Thompson, 394 U.S. 618 (1969). The immediate right being sought in Shapiro was statutory eligibility to apply for welfare benefits. The immediate right being sought by petitioner is a statutory eligibility to apply for discretionary relief to continue domicile in

the United States. Neither of these rights is fundamental. However, in Shapiro and in this case, denial of eligibility to apply for a statutory right infringes on a fundamental right; in Shapiro, the right to interstate travel, in this case, all fundamental and constitutional rights. Because of the ultimate infringement on a fundamental right, the strict scrutiny test was applied in Shapiro and should be applied in this case.

Petitioner does not assert that a permanent resident alien has a vested right of residence in the United States, equal to that of a citizen. He does not assert that Congress has no authority to distinguish between which aliens to expel. His assertion is very narrow: that when Congress extends a statutory right to discretion from hardship to aliens, it should present a compelling state interest to justify treating two similarly situated aliens differently.

(2) The "Rational Relationship" Standard

Under the "rational relationship" standard "[t]he (legislative) classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced be treated alike

F.S. Royster Cuano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Under this standard, equal protection analysis initially begins with the identification of the trait which forms the basis of the legislative classification. An attempt is next made to ascertain the purpose of the statute, and whether this purpose furthers a permissible governmental goal. Once the classification and the purpose of the statute is ascertained, the Court then puts them together to determine whether the classification bears a rational relationship to the purpose of the statute. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

In the context of this case, the legislative classification of §212(c) is aliens who are

(a) lawfully admitted for permanent residence and have been domiciled in the United States for more than seven years;

(b) have been convicted for a marijuana related offense and

(c) have voluntarily proceeded abroad after their conviction.

Petitioner is a lawful permanent resident who has been domiciled in the United States for eighteen years. He has

been convicted of a marijuana related offense. But he does not meet the legislative classification of §212(c) because he remained in the United States after his conviction.

The obvious purpose of §212(c) is to provide the Attorney General with discretion to alleviate any undue hardship which may result from the operation of the Immigration Law. We can conceive of no reason why not including persons who stayed in the United States after a conviction would further this purpose. Indeed, a person who has continuously remained in the United States is more likely to be subjected to more hardship by a forced departure from the United States than a person who has left this country and returned or is attempting to return.

The legislative history of § 212(c) does not offer any rationale for denying an opportunity to apply for relief to persons who have remained in the United States after conviction. It indicates only that Congress wanted discretionary relief limited to those who had been admitted for lawful permanent residence and who had an unrelinquished domicile in the United States for a specified time. The eligibility requirements of § 212(c) were apparently intended to penalize those who did not have lawful permanent residence status for more than seven years. Prior law had offered

discretionary relief to persons not lawfully admitted as permanent residents.[4]

It would appear that Congress inadvertently did not provide discretionary relief for persons such as petitioner. "It follows that (the statute) is arbitrary in effect; and none the less because it is probable the unequal operation of the (statute) was due to inadvertence rather than design." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412,416 (1920).

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[4] See 1952 U.S. Code Congressional And Administrative News, 1705, quoting House Report No. 1365, February 4, 1952, to accompany H.R. 5678:

Having concluded that failure by an alien to meet the strict qualitative tests will disqualify him for admission to the United States, the committee is of the opinion that any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and that the discretionary authority should be surrounded with strict limitations.

Under present law, in the case of an alien returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years, he may be admitted in the discretion of the Attorney General under such circumstances as the Attorney General may prescribe. Under existing law the Attorney General is thus empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States. The comparable discretionary authority vested in the Attorney General in section 212(c) of the bill is limited to cases where the alien has been previously admitted for lawful permanent residence and has proceeded abroad voluntarily and not under the order of deportation.

In cases analogous to petitioner's, the Supreme Court has invalidated statutes under the traditional rational relationship test. In each case the governmental purpose was legitimate, but the legislative classification was held violative of equal protection because it did not treat all those similarly situated alike.

A New Jersey law in Rinaldi v. Yeager required that a person sentenced to prison after an unsuccessful appeal in which the county paid the cost of the transcript, reimburse the county for the cost of the transcript. 384 U.S. 305 (1966). Reimbursement was not required of those unsuccessful appellants given a suspended sentence, placed on probation or sentenced to pay a fine. The purpose of the statute, reimbursement from unsuccessful indigent appellants, was legitimate. However, the Supreme Court could find no reason why only those sentenced to jail should have the burden of reimbursement because consideration of sentencing bore noorational relationship to the purpose of reimbursing the state; therefore, the statute was deemed to be a violation of equal protection.

A Virginia statute in F.S. Royster Guano, supra, taxed local corporations which did business in and outside

of Virginia on the income derived from their out-of-state activities. Local corporations which did no business in Virginia were not taxed on income derived from their out-of-state activities. The court found that the purpose of the statute was to exempt out-of-state business operations from taxes because Virginia did not give such businesses any protection. The court did not find any rational relationship between this purpose and the statutory classification; the fact that a company also did business inside a state had nothing to do with whether its out-of-state income should be taxed. The statute was held violative of equal protection.

Baxtrom v. Harold invalidated a New York "statutory procedure under which a person [could] be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York." 383 U.S. 107 at 110 (1966). The court found that

> [f]or purposes of granting judicial review before a jury of the question of whether a person is mentally ill and in need of institutionalization, there is no conceiveable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.
> 383 U.S. at 111 (1966).

The purpose of 212(c) is to provide the Attorney General with discretion to alleviate any undue hardship which

may result to permanent residents of more than seven years and their families. Barring petitioner from applying for discretionary relief only because he remained in the United States after his conviction bears no relation to this purpose.

(3) A More Demanding Rational Relationship Standard

As this Court has recognized , " a more demanding version of the traditional 'rational relationship' test" has emerged. City of New York v. Richardson, 473 F. 2d 923 at 931 (1973), cert denied, Sub. nom. Lavine v. Lindsay, 412 U.S. 950 (1973).

Under this standard a court ascertains the actual purpose and the adverse impact of a legislative classification. It then determines whether the discriminatory legislative classification furthers a substantial legislative interest in light of its impact.[5]

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[5] See "Equal Protection In Transition: An Analysis And A Proposal," 41 Fordham Law Review, 605 (March, 1973); Gunther Gerald, "The Supreme Court, 1971 Term - Forward: In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection," 86 Harvard Law Review 1 (1972); "The Decline And Fall Of The New Equal Protection: A Polemical Approach," 58 Virginia Law Review, 1489 (1972), (Part 2).

Several recent Supreme Court decisions illustrate this standard. Reed v. Reed dealt with an equal protection challange to a statute which required mandatory preference of males over females when a male and a female of equal entitlement and qualifications both filed applications for letters of administration of an estate. 404 U.S. 71 at 74 (1971). The court found "some legitimacy" in the state's purpose: to simplify probate proceedings. A classification of preference based on sex appeared to bear a significant relationship to the state's purpose; automatic preferences did avoid litigation and simplify probate proceedings. But the court delved further into the nature of the classification and found that such a sex criterion was "arbitrary." Similarly in Eisenstadt v. Baird, the court found that a legislative classification had a "marginal relation" to a legitimate state purpose but that it nevertheless violated the Equal Protection Clause. Eisenstadt v. Baird, 405 U.S. 438 at 448 (1972). And in Weber v. Aetna Casualty and Surety Company, the court held that the legislative interest furthered by the statute must be "substantial" to justify the discrimination it imposed. Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 170 (1972).

A Kansas statute in James v. Strange subjected

indigent defendants to recoupment for state furnished attorney's fees without affording such debtors the array of protective exemptions Kansas had erected for other civil judgment debtors. 407 U.S. 128 (1972). The court found that the state had a legitimate and important interest in recoupment. The court also found that the statutory classification treated all indigent defendants alike. Further, the court found that a debt to a state government may be treated differently from a private debt. The court, however, did not find that the classification bore a rational relationship to the statute's purpose. Instead, it examined more closely the impact of the classification. The court was particularly concerned with the fact that indigent defendant debtors were not protected from total wage garnishment as were other civil judgment debtors. The conditions imposed on indigent defendant debtors were deemed to be "harsh" and the court stated that the state's "interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors..." 407 U.S. at 141.

The court again focused on the impact of the legislative classification in Jackson v. Indiana, 406 U.S. 715 (1972). The court invalidated a statute which allowed

commitment of a criminal defendant incompetent to stand trial with less procedural safeguards than those which applied to civil commitment. The court stressed that the process applied to defendants incompetent to stand trial often resulted in lifetime commitment. However, the court said that if the commitment were "only temporary," it might be permissible to use standards different from those required in civil commitment proceedings. Thus, the court based its decision on whether the classification bore a rational relationship to purpose, in part, on the degree of adverse impact of the classification.

The purpose of § 212(c) is to provide a means of ameliorating hardship which would result from exclusion or deportation of a permanent resident of more than seven years. This purpose is in no way furthered by denying a permanent resident of more than seven years an opportunity to apply for discretionary relief only because he remained in the United States after his conviction. Further, denying petitioner an opportunity to apply for discretionary relief would have an extremely adverse impact upon him. He would immediately be separated from his family, his mother, father, brother and friends. He would be banished from the country and culture in which he spent the last eighteen years of his twenty-seven

years, where he was raised, educated and grew to adulthood.

Therefore, under a more demanding rational relationship standard, section 212(c) violates equal protection of law.

CONCLUSION

Section 212(c) denies petitioner equal protection of law. The decision of the Board of Immigration Appeals dismissing petitioner's appeal should be overruled and petitioner should be allowed to apply for discretionary relief from deportation.

Respectfully Submitted,

MORTON B. DICKER
Attorney for Petitioner
Office & P.O. Address
THE LEGAL AID SOCIETY
11 Park Place
New York, New York 10007
Tel: BA 7 - 2755

JULIUS C. BIERVLIET and
JANET M. CALVO, of counsel.

APPENDIX

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

In the Matter of	File No. A 10 966 980 - New York
Deportation Proceedings	In Behalf of Respondent:
- against -	Legal Aid Society Julius Biervliet, Esq. of Counsel
ANTHONY CARVALHO	11 Park Place New York, N.Y. 10007
- Respondent -	In Behalf of Service:
	Martin J. Travers, Esq. Trial Attorney New York, N.Y.

ORDER OF IMMIGRATION JUDGE ON MOTION TO REOPEN

Respondent asks that his deportation hearing be reopened to enable him to apply for relief under Section 212(c) of the Immigration and Nationality Act, 8 USC 1182(c).

On March 27, 1968 another Immigration Judge ordered respondent deported to Portugal, having admitted his deportability after conceding that he was convicted for possession of Marijuana.

On January 24, 1974 the respondent moved to reopen these proceedings to apply for relief under Section 212(c) which provides that aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily ... and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted ... However, this relief is

not available in a deportation proceeding. The statute empowers the Attorney General to waive grounds of inadmissibility. The respondent not having left the United States, has no basis for claiming the benefits of this waiver.

The respondent also raises the question as to whether he was denied due process of law by the possible erroneous waiver of the right to counsel. This issue was raised in a nebulous way and no evidence has been offered on this issue.

Lastly, the constitutional issue is mentioned in that permanent resident aliens are not being treated equally by denying them the right to relief under Section 212(c) vis-a-vis an alien in an exclusion proceeding. No authority exists for me to rule on the constitutionality of any statute. Hence I am compelled to deny the motion in all respects.

ORDER: IT IS ORDERED that respondent's motion to reopen deportation proceedings be and the same hereby is DENIED.

Howard Cohen

HOWARD I. COHEN
Immigration Judge

DATED: February 5, 1974

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

FEB 21 1974

File: A10 966 980 - New York

In re: ANTHONY De CARVALHO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Legal Aid Society
11 Park Place
New York, N.Y. 10007

Of Counsel: Julius Biervliet, Esq.

CHARGE:

Order: Section 241(a)(11), I&N Act (8 U.S.C. 1251(a)(11)) - Convicted of a violation of any law or regulation relating to the illicit possession of or traffic in marihuana

APPLICATION: Motion to reopen

This is an appeal from an order of an immigration judge, dated February 5, 1974, denying respondent's motion to reopen the proceedings in order to apply for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act. The appeal will be dismissed.

The Order to Show Cause charged the respondent with deportability for having been convicted in the United States District Court, Tucson, Arizona, on November 27, 1967, of the offense of possession of marihuana in violation of 21 U.S.C. 176(a). After a hearing held at the Federal Reformatory, El Reno, Oklahoma, on March 27, 1968, the respondent was found deportable by an immigration judge and ordered deported to Portugal. There was no appeal from the order which became administratively final.

Deportation was stayed, however, until March 18, 1973. On his application for stay, on Form I-246, dated January 5, 1969, the respondent said that he had been sentenced under the "youth corrections act", evidently referring to the Federal Youth Corrections Act. His affidavit of January 24, 1974 states that he was released on parole on August 28, 1968, after serving a portion of a sentence of up to six years. The respondent reported in his affidavit that he had been arrested on March 3, 1971 for possession of heroin, but that the charge had been dropped. The affidavit also indicates that the respondent's parole was revoked in April 1971 and that he was thereupon incarcerated until December 18, 1972, when he was again released on parole.

There is no indication in the file that the respondent's conviction has been expunged under the Federal Youth Corrections Act. Hence, there is no showing that his conviction has been removed as a ground for deportation according to the holding in the case of Mestre Morera v. INS, 462 F. 2d 1030 (1 Cir. 1972).

Counsel contends that the Immigration and Nationality Act is unconstitutional in that it does not make a waiver of inadmissibility under section 212(c) available in deportation proceedings. The essence of counsel's argument is that had the respondent been charged in exclusion proceedings with inadmissibility under section 212(a)(23), because of a marihuana conviction, a waiver would be possible under section 212(c). However, the respondent was made the subject of deportation, not exclusion, proceedings following his conviction for the illicit possession of marihuana. There is no evidence other than the respondent's own affidavit that he ever left the United States. He claims to have visited Mexico for ten days, but there is no claim that he was not readmitted upon his return. Thus, deportation proceedings were properly instituted against him. Under section 241(a)(11), a person convicted of possessing marihuana illegally is deportable. There is no provision in the Act for a waiver of this ground for deportation. Counsel claims this statutory arrangement is unconstitutional in that it treats lawful permanent residents

in exclusion proceedings differently from permanent residents in deportation proceedings. Our function, however, does not include passing upon the constitutionality of the statutes we administer, Matter of L-, 4 I&N Dec. 556 (BIA 1951); Matter of Santana, 13 I&N Dec. 362 (BIA 1969). //

Counsel, in his own affidavit, avers that "At the hearing, [the respondent] might have erroneously waived the services of an attorney." As the immigration judge pointed out, no evidence was submitted to support this vague contention.

The immigration judge, in his decision of March 27, 1968, stated that there had been no application for discretionary relief. He accordingly made no grant of voluntary departure. Inasmuch as the respondent is deportable under section 241(a)(11), he is not eligible, at this time, for any form of discretionary relief.

ORDER: The appeal is dismissed.

Chairman